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In the Supreme Court of the United States

OCTOBER TERM, 1979

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, PETITIONER

v.

KALO BRICK & TILE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IOWA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

In this case, a shipper filed an action for damages in a state court against a railroad subject to the jurisdiction of the Interstate Commerce Commission, alleging that the railroad's cessation of service to the shipper violated the railroad's obligation under state statutory and common law. In separate proceedings

under the Interstate Commerce Act, however, the Commission held that the railroad's cessation of service was for reasons beyond its control and was therefore lawful under that Act. The Commission also granted the railroad's application under 49 U.S.C. (1970 ed.) 1(18) to abandon the line of track serving the shipper. The questions presented are:

1. Whether the Interstate Commerce Act precludes a state court from awarding damages to the shipper under state law in these circumstances.

2. Whether, if a cause of action does lie under state law, the Interstate Commerce Commission has primary jurisdiction to determine whether the railroad's cessation of service and abandonment of the line were lawful.

INTEREST OF AMICI CURIAE

The Interstate Commerce Commission is the federal agency charged generally with the regulation of railroads engaged in interstate commerce. Such regulation necessarily extends to determining whether an interstate railroad is furnishing an adequate level of service, whether a cessation of rail service in interstate commerce is reasonable in a particular instance, and whether the public convenience and necessity permit abandonment of a rail line used in interstate commerce. The Commission's ability to take a consistent, nationwide approach to these problems affecting the interstate rail system would be severely undercut by the allowance of suits brought under

state law to recover damages for actions by a railroad that are subject to the exclusive jurisdiction of the Commission, particularly where, as here, the Commission has found the railroad's actions to be lawful and in the public interest under federal law.

STATEMENT

1. Petitioner is a common carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission under the Interstate Commerce Act, 49 U.S.C. (1970 ed.) 1(1).[1] The Act sets forth the obligations of rail carriers subject to the Commission's jurisdiction and establishes a comprehensive mechanism for the enforcement of those obligations.

Thus, the Act requires carriers to provide and furnish transportation upon reasonable request (49 U.S.C. (1970 ed.) 1(4); Pet. App. 42a) and to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to such service. 49 U.S.C. (1970 ed.) 1(11), 1(14)(a); Pet. App. 43a-

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[1] The Interstate Commerce Act was revised, recodified, and reenacted without substantive change as subtitle IV of Title 49, United States Code. Pub. L. No. 95-473, 92 Stat. 1337. For convenience, references in this brief will be to the original Act, because the decisions below, the controlling decisions of this Court, and the relevant decisions of the Interstate Commerce Commission cite the original Act.

The Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. No. 94-210, 90 Stat. 31) also made certain changes in Section 1 of the Interstate Commerce Act that are not pertinent to the issues in this case.

45a. When a railroad fails to meet its statutory duties, the Act renders the railroad liable in damages to persons injured as a consequence. 49 U.S.C. (1970 ed.) 8; Pet. App. 50a. A person seeking damages may file a complaint either with the Commission or in any district court of the United States (49 U.S.C. (1970 ed.) 9), although the primary jurisdiction doctrine requires initial submission to the Commission of issues of nationwide transportation policy under the Act. See *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 579 (1966). Finally, before a railroad may abandon or discontinue the operation of a line, it must obtain a certificate from the Commission based on a finding that the public convenience and necessity permit such abandonment. 49 U.S.C. (1970 ed.) 1(18); Pet. App. 48a-49a. See *Colorado* v. *United States*, 271 U.S. 153 (1926).

2. Prior to April 1973, petitioner operated a branch line, 5.6 miles in length, between Fort Dodge and Kalo, Iowa. Respondent operated a brick manufacturing plant near Kalo at the terminus of petitioner's branch line. Petitioner furnished cars to respondent for use exclusively in interstate commerce; respondent's shipments within the State of Iowa were made by truck (Pet. App. 13a, 33a). By April 1973, respondent was the only shipper using the line (*id.* at 35a).

In 1961 and 1966 the tracks on the branch line were damaged by earth slides, but petitioner made

necessary repairs (Pet. App. 14a). Another slide occurred in March 1967, when the embankment disappeared into the Des Moines River at several locations on one stretch of the line. Service was never resumed over that stretch (*ibid.*). Instead, petitioner leased a portion of another branch line between Kalo and Fort Dodge owned by the Des Moines & Southern Railway to bypass the damaged stretch of its own line. By using the leased track and the remaining portion of its own line, petitioner was able to continue to serve respondent (*id.* at 14a-15a).

On April 4, 1973, additional slides damaged the leased portion of the Des Moines & Southern line. Petitioner promptly notified respondent that it could no longer provide cars to respondent's plant, and petitioner then terminated service (Pet. App. 15a). Petitioner did, however, provide cars to respondent at Fort Dodge, although respondent was required to deliver its goods to Fort Dodge by truck at its own expense. On April 18, 1973, respondent notified its customers that it was going out of business but that it would complete existing contracts (*ibid.*).

3. On November 14, 1973, petitioner applied to the Commission for a certificate of public convenience and necessity to abandon its line between Fort Dodge and Kalo. Respondent protested the application (Pet. App. 17a).

On April 30, 1976, the Commission concluded that the present and future public convenience and necessity permitted the abandonment (Pet. App. 34a-

40a). The Commission first held that the cessation of service in 1973 "occurred because of conditions over which [petitioner] had no control, not because of willful abandonment" (Pet. App. 35a). The Commission further found that, due to the soil condition and mining activities in the vicinity of the lines, any repairs made to petitioner's line and the leased portion of the Des Moines & Southern line would be insufficient to insure continuous operation over them.[2] For these reasons, the Commission concluded that continued operation of the line would be an unnecessary burden on petitioner and on interstate commerce (*id.* at 35a-36a). Respondent's petition for reconsideration of this ruling was denied (*id.* at 41a), and respondent sought no further administrative or judicial review of the decision. Nor did respondent file a damage action in federal court under 49 U.S.C. (1970 ed.) 9 alleging that petitioner had unlawfully ceased service and abandoned its line.

4. In September 1974, respondent instituted this action against petitioner in Iowa state court, alleging that petitioner's failure to furnish cars and service after April 1973 was in violation of state statutory and common law and that respondent was thereby damaged in the amount of $350,000 (Pet. App. 18a). In April 1976, respondent amended its complaint to allege that petitioner had been negligent in the main-

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[2] The Commission found that it would cost $150,000 to rehabilitate petitioner's line and $100,000 to rehabilitate the leased track, even on a temporary basis (Pet. App. 35a).

tenance of the roadbed in 1973 and had tortiously interfered with respondent's contracts with its customers.

In October 1976, the state trial court dismissed the suit, holding that the questions raised were within the exclusive jurisdiction of the Interstate Commerce Commission (Pet. App. 21a, 23a-25a). However, in October 1979, the Court of Appeals of Iowa reversed and remanded for trial (*id.* at 2a-12a). In the Court of Appeals' view, the state trial court had jurisdiction to adjudicate respondent's suit based on petitioner's alleged violations of state law, and the Interstate Commerce Act had not preempted that jurisdiction (*id.* at 5a-10a). The court also held that there was no need to defer to the Commission under the doctrine of primary jurisdiction because the issues raised are within the conventional experience of judges and do not require the exercise of administrative expertise (*id.* at 10a-11a). The Supreme Court of Iowa, by order dated November 30, 1979, refused to grant further review (*id.* at 1a).

ARGUMENT

The decision of the Court of Appeals of Iowa presents important questions warranting this Court's review. The Interstate Commerce Act and decisions of this Court establish, we submit, that the Interstate Commerce Commission has exclusive jurisdiction to determine whether interstate railroads have complied with their obligations to provide adequate service to

shippers and whether such railroads may abandon lines of track. The decision below would subject a railroad to liability for damages under state law for cessation of service and abandonment of a line, even though the Commission has determined that the railroad's actions were lawful and in the public interest under the Interstate Commerce Act. This would significantly impair the Commission's ability to carry out its statutory responsibilities and would impose potentially conflicting obligations on railroads subject to the Commission's jurisdiction. Whether such a result is consistent with the scheme of the Interstate Commerce Act is an important question that should be reviewed by this Court.

1. By holding that petitioner may be liable in damages under state law for its cessation of service to respondent in April 1973, the decision below clashes with the Commission's exclusive jurisdiction to determine whether a railroad subject to the Interstate Act is providing an adequate level of service.

a. As noted above (see pages 3-4, *supra*, the Interstate Commerce Act imposes on interstate railroads the obligation to provide and furnish transportation upon reasonable request and to furnish safe and adequate car service to shippers. 49 U.S.C. (1970 ed.) 1(4) and 1(11). Furthermore, the Esch Car Service Act of 1917, ch. 23, 40 Stat. 101, and the Transportation Act of 1920, ch. 91, 41 Stat. 456, 476, give the Commission broad powers to establish rules and regulations defining the carriers' service obligations. See 49 U.S.C. (1970 ed.) 1(14).

It is well settled in the administration of these provisions that when a rail carrier ceases or suspends service for reasons allegedly beyond its control (a practice commonly known as an "embargo"), the Commission has jurisdiction under 49 U.S.C. (1970 ed.) 1(4) and (11) to determine the reasonableness and thus the lawfulness of the cessation or suspension. See, *e.g.*, *ICC* v. *Chicago & N.W. Transp. Co.*, 533 F.2d 1025, 1027 n.2 (8th Cir. 1976); *New York Central R.R.* v. *United States*, 201 F. Supp. 958, 960 (S.D.N.Y. 1962), appeal dismissed, 371 U.S. 805 (1962); *Asbury* v. *Chesapeake & Ohio Ry.*, 314 F. Supp. 310, 313 (D.D.C. 1970). Accord, *Baltimore Chamber of Commerce* v. *Baltimore & O. R.R.*, 45 I.C.C. 40, 53 (1917). Once an embargo is lawfully imposed, a railroad is not obligated to furnish car service and is not liable to a shipper for damages under the Act. *Chicago & N.W. Ry.* v. *Union Packing Co.*, 373 F. Supp. 734, 737 (D. Neb. 1974), aff'd, 514 F.2d 30 (8th Cir. 1975); *ICC* v. *Chicago & N.W. Transp. Co.*, *supra*, 533 F.2d at 1027 n.2; *General Foods Corp.* v. *Baker*, 451 F. Supp. 873, 876 (D. Md. 1978). See also *Eastern Ry.* v. *Littlefield*, 237 U.S. 140, 145 (1915).

The Commission's jurisdiction to determine the reasonableness of a cessation of service is necessarily exclusive (subject, of course, to judicial review of the Commission's order under 28 U.S.C. 2321), and the Interstate Commerce Act accordingly preempts state laws that purport to establish inde-

pendent service obligations on carriers subject to the Commission's jurisdiction. If this were not so, carriers would face conflicting obligations when, as could occur under the decision below, a state court disagrees with the Commission's determination of the reasonableness of an embargo or the carrier's level of service to shippers. See *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), compare *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 299-300 (1976). Thus, recognition of a state law damage remedy would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977), quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Indeed, this Court has squarely held that the standards and enforcement provisions of the Interstate Commerce Act preempt state law with respect to the service obligations of interstate carriers. In *Missouri Pacific R.R.* v. *Stroud*, 267 U.S. 404, 408 (1925), the Court held that a shipper could not bring suit in state court alleging that a carrier's failure to supply cars to the shipper violated state law, explaining that "state law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce." See also *Chicago, Rock Island & Pacific Ry.* v. *Hardwick Farmers Elevator Co.*, 226 U.S. 426, 433 (1913); *United*

States v. *New River Co.*, 265 U.S. 533, 541-542 (1924).[3]

b. The Iowa Court of Appeals conceded (Pet. App. 10a) that if the state statutes in question here were "regulatory" in nature, "it could not be gainsaid that federal law is supreme, rendering state law void." But the court concluded (*ibid.*) that the state law relied on by respondent is "remedial only" and "exerts no burden on interstate commerce, nor does it interfere with regulatory powers and duties of the ICC."[4] The court plainly erred, both in its reasoning and its conclusions.

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[3] As noted earlier (page 4, *supra*), the Interstate Commerce Act also gives jurisdiction to federal district courts over complaints that carriers have failed to meet their service obligations or have unlawfully abandoned lines. 49 U.S.C. (1970 ed.) 9. But respondent did not file a damage action in federal court. State courts have no jurisdiction to entertain actions under 49 U.S.C. (1970 ed.) 9, and they cannot impose independent state law service obligations on carriers subject to the Act.

[4] Respondent advances these same arguments in its Brief in Opposition (at 7-8). Respondent cites *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 663-664 (1961), for the proposition that a cause of action under Iowa state law has not been preempted because the state law is not "regulatory" in nature. But the Court there held only that a provision of the Natural Gas Act conferring exclusive jurisdiction on federal courts in cases arising under that Act did not deprive a state court of jurisdiction over a state law breach-of-contract claim involving the sale of natural gas, even though a defense arising under federal law might be interposed. The Court expressly declined to decide whether the Natural Gas Act abrogated the substantive state law contract rights involved. 366 U.S. at 664. Here, of course, the question is whether federal law preempts the substantive law

First, preemption does not turn on the characterization of the state law in question as "remedial" or "regulatory" in nature or the intent of the state legislature in enacting it. *Perez* v. *Campbell*, *supra*, 402 U.S. at 650-652. It is the *effect* of the state law on the accomplishment of the purposes underlying the federal statute that is determinative. *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 526. Conduct that would be inconsistent with that ordered or sanctioned pursuant to federal law could be compelled by a state as readily by authorizing private damage actions labeled "remedial" as through a "regulatory" program administered by a state agency.

Second, contrary to the assumption of the court below, a state award of damages for conduct found lawful under federal law can burden interstate commerce, both because the award itself diminishes the total resources the carrier has available to operate

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upon which respondent relies, not the jurisdiction, as such, of the Iowa courts to entertain actions for negligence or interference with contractual rights brought against railroads subject to the jurisdiction of the Commission.

Moreover contrary to respondent's contention (Br. in Opp. 7 n.9), there is nothing in *Missouri Pacific R.R.* v. *Stroud*, *supra*, to suggest that its holding was dependent on the existence of a "regulatory" rather than a "remedial" state law. Indeed, that case, like this one, was a private damage action brought for violation of a state statute. There is likewise nothing in *Powell* v. *United States*, 300 U.S. 276, 287 (1937), or *United States* v. *New River Co.*, *supra*, to support respondent's contention (Br. in Opp. 7 n.9) that preemption principles are applicable in this area only where there is state "regulation" by means of an administrative process.

in interstate commerce and because the threat of such awards will lead carriers to divert to local concerns scarce resources needed elsewhere to satisfy the demands of interstate commerce. And third, for these same reasons, the railroad's potential liability under state law would interfere with the Commission's effective exercise of its regulatory powers, because such liability would effectively compel carriers to furnish transportation that the Commission has determined or may determine could properly be withheld or terminated under federal law. In the present case, the Commission, in a proceeding to which respondent was a party, held that petitioner's cessation of service in April 1973 was not unlawful, but instead "occurred because of conditions over which [petitioner] had no control * * *" (Pet. App. 35a). Any decision by the state court finding petitioner liable in damages under state law would necessarily conflict with that determination.

c. The Court of Appeals' and respondent's reliance on several decisions by this Court in support of the judgment below is misplaced (see Pet. App. 6a-10a; Br. in Opp. 5-8). In *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915), the case principally relied upon, the Court upheld a state court damage suit by a shipper claiming that the railroad had unjustly discriminated against it by failing to supply cars in accordance with a rule promulgated by the railroad itself. The Court stressed that in cases "where the [railroad's] rule of practice itself is at-

tacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission." 237 U.S. at 131. But the Court held that where, as in *Puritan*, a railroad is sued for violating its own rule or practice, which is lawful and unchallenged on its face, state courts have jurisdiction "to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage." 237 U.S. at 132.

The limited holding in *Puritan*, recognizing state remedies only where the reasonableness of the carrier's rule or practice is not called into question and where there is no need to rely on the expertise of the Commission, was expressly reaffirmed in *Illinois Central R.R.* v. *Mulberry Hill Coal Co.*, 238 U.S. 275, 281-283 (1915), and *Pennsylvania R.R.* v. *Sonman Shaft Coal Co.*, 242 U.S. 120, 124-126 (1916), upon which the Court of Appeals and respondent also rely.[5] See also *Midland Valley R.R.* v. *Barkley*,

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[5] In *Mulberry*, the plaintiff did not attack the railroad's rule of distributing cars, so no issue within the Commission's exclusive or primary jurisdiction was presented. 238 U.S. at 281-283. In *Sonman*, the Court found that industry conditions were normal and that the shipper's demands were reasonable; the carrier's rule or practice for allocating rail cars was therefore not a factor in the decision of the case, and the exercise of the Commission's expertise was not required. But in the instant case, conditions clearly were abnormal. Repeated earth slides had disrupted petitioner's line, and circumstances called for the administrative expertise of the Commission in determining whether the requirements of interstate commerce warranted continued service to respondent.

276 U.S. 482 (1928); *Eastern Ry.* v. *Littlefield*, *supra*, 237 U.S. at 143. The preservation of other remedies by Section 22 of the Interstate Commerce Act (see Pet. App. 6a; Br. in Opp. 6) therefore must be read to preserve state law remedies only where they are not inconsistent with the federal statutory scheme. See *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, *supra*, 204 U.S. at 446-447.

The instant case, in contrast to *Puritan*, involves an assertion by respondent that petitioner's "practice" of discontinuing service subsequent to the earth slides was unreasonable and unlawful. As *Puritan* itself indicates, that is an issue only the Commission can resolve (subject, of course, to judicial review in the federal courts), and the Commission has done so here, rejecting respondent's contention. A judgment by the Iowa courts against petitioner would directly interfere with the Commission's responsibility to determine the degree of service warranted by the public interest and, in so doing, to weigh the needs of local communities on the line against the broader national interest in allocating the railroad's limited resources elsewhere. See *Colorado* v. *United States*, 271 U.S. 153, 164 (1926).[6]

2. The decision of the Court of Appeals also interferes with the Commission's statutory responsibility

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[6] In addition, *Puritan* and the other decisions of this Court relied upon in the decision below preceded the enactment of the Esch Car Service Act of 1917 and the Transportation Act of 1920, which enactments plainly establish the Commission's plenary authority to fix a reasonable level of car service. See page 8, *supra*.

to determine whether the public interest and the national transportation policy warrant abandonment of a line of track.

It is apparently immaterial to the decision below whether the cessation of service or injury to respondent occurred before or after the Commission formally authorized abandonment of petitioner's line. Thus, respondent may be entitled to recover damages for its loss of business occasioned by the cessation of service both prior to and following the September 1976 Commission order approving the abandonment.

A recovery by respondent for loss of rail service after the effective date of abandonment in 1976 would directly conflict with the proper administration of the Interstate Commerce Act, which confers on the Commission the responsibility to determine whether an interstate railroad may abandon a line used in interstate commerce. 49 U.S.C. (1970 ed.) 1(18). Section 1(18) prohibits a railroad from abandoning a line unless the Commission issues a certificate that the present or future public convenience and necessity permit the abandonment.

This Court has recognized that Congress' purpose in enacting Section 1(18) was to remove local obstructions that would otherwise prevent a railroad from performing its federal duty. In *Colorado* v. *United States, supra,* the Court held that a state could not compel a railroad to continue operating a line after the Commission had authorized its abandonment. The Court explained that in enacting Sec-

tion 1(18), Congress sought to prevent states from requiring railroads to make excessive expenditures to promote local interests at the expense of the railroads' overall ability to provide interstate transportation. 271 U.S. at 162-164. See also *Maine Department of Transp.* v. *ICC*, 587 F.2d 541, 543 (1st Cir. 1978). Accordingly, the Act charges the Commission with weighing the benefits to particular communities and commerce of continued operations against the burdens on commerce generally. *Colorado* v. *United States, supra*, 271 U.S. at 168; *ICC* v. *Railway Labor Executives Ass'n*, 315 U.S. 373, 376-377 (1942); *Purcell* v. *United States*, 315 U.S. 381, 383-385 (1942). Once the Commission decides that the public convenience and necessity permit an abandonment, the states are powerless to require a railroad to expend additional funds and to continue service to those local communities served by the affected rail line. *Colorado* v. *United States, supra*, 271 U.S. at 162-164. See also *Alabama Public Service Comm'n* v. *Southern Ry.*, 341 U.S. 341, 346 n.7 (1951).

The Iowa Court of Appeals' decision in this case is therefore inconsistent with the statutory scheme to the extent that it would impose an independent state law obligation on petitioner to continue operations for the benefit of a particular shipper, notwithstanding a finding by the Commission that the public convenience and necessity do not warrant the diversion of the railroad's finite resources to satisfy the particular local interest. Hence, the state law re-

lied upon by the court below is necessarily preempted to the extent it would conflict with federal law.[7]

3. Even if a cause of action lies under state law in the circumstances of this case, the Iowa Court of Appeals erred in concluding that the Commission does not have primary jurisdiction over the dispute. The primary jurisdiction doctrine requires the initial submission to the Commission of questions that call for the application of uniform standards and national transportation policy and that are within the expertise of the Commission. *ICC* v. *Atlantic Coast Line R.R.*, *supra*, 383 U.S. at 579; *Far East Conference* v. *United States*, 342 U.S. 570 (1952). Both the courts and the Commission have held that whether an interstate railroad is providing an adequate level of service to its shippers is a question that ought to be decided on the basis of uniform national standards and that presents important issues of national transportation policy. It is also a question that usually calls for an expert assessment of the particular facts, including comparisons with the experience of comparable railroads. See *Loomis* v. *Le-*

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[7] Moreover, even if the Iowa court were to limit damages to the period between April 1973 and September 1976, during which petitioner's embargo was in effect, the court's holding would infringe on the Commission's abandonment authority. There is always some delay between the time an abandonment application is filed and the time the Commission grants or denies it. As in this case, an embargo is often in effect in the interim. If states could compel a railroad to continue operations during this period, they could frustrate the Commission's abandonment authority by requiring massive last-minute commitments of funds in the local interest.

high Valley R.R., 240 U.S. 43, 48-51 (1916); *Taylor County Sand Co.* v. *Seaboard Coast Line R.R.*, 446 F.2d 853 (5th Cir. 1971); *Elgin Coal Co.* v. *Louisville & Nashville R.R.*, 411 F.2d 1043 (6th Cir. 1969); *Winnebago Farmers Elevator* v. *Chicago & N.W. Transp. Co.*, 354 I.C.C. 859 (1978). See generally *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *Midland Valley R.R.* v. *Barkley, supra.*

Accordingly, even if a cause of action under state law survives in circumstances such as those presented here, the state court must defer to the Commission's primary jurisdiction on the central question of whether the railroad's cessation of service and ultimate abandonment were lawful. Once the Commission ruled in the present case that they were, the Iowa courts could not ignore that determination and award damages under state law for these actions.[8]

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[8] Furthermore, we note that respondent participated in the proceedings before the Commission and had an opportunity to litigate the reasonableness of petitioner's embargo and whether the public convenience and necessity permitted abandonment of petitioner's line between Fort Dodge and Kalo. Respondent did not seek review of the Commission's final decision, as it was entitled to do under 28 U.S.C. 2321 and 2342 (5). In these circumstances particularly, respondent should not be permitted to relitigate those determinations in a state court suit. See *Ciba Corp.* v. *Weinberger*, 412 U.S. 640, 644 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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